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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1303

QANTAS AIRWAYS LIMITED,
Petitioner,

vs.

FOREMOST INTERNATIONAL TOURS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Foremost International Tours, Inc., the plaintiff and appellee in the proceedings below, prays that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case be denied.

QUESTION PRESENTED

The Question Presented by Qantas Airways Limited (hereinafter Qantas) should be clarified in two respects:

1. Qantas states:

"The District Court found that Qantas was selling below cost because Qantas was not including in its inclusive tour prices any of the normal airline overhead costs allocable to the inclusive tours in question." Petition at 2-3.

This is a misleading statement. That Qantas failed to allocate any of its general business expenses (fixed overhead and variable costs) as costs for the land services on its tours was not the only finding of the District Court. *See* Finding of Fact 17, *Foremost International Tours, Inc. v. Qantas Airways Limited,* 379 F.Supp. 88, 92 (D. Hawaii 1974), Appendix to petition at 37a. The Court also found, using Qantas' own figures, that Qantas was selling its tours below the actual cost to Qantas of the land components of the tour. In Finding of Fact 16, the District Court found that if the actual rate of exchange on April 1, 1974 (per the Bank of America) was used, the Qantas 14-day group inclusive tour to Australia selling at a price of $US 899.00 resulted in a loss to Qantas, 379 F.Supp. at 92, Appendix to petition at 36a.

2. Qantas also states that "the CAB took jurisdiction of most of the acts complained of." Petition at 3. In a Letter of Notice of Dismissal, in Part, dated December 15, 1975, the Bureau of Enforcement of the Civil Aeronautics Board gave notice that no enforcement proceeding would be instituted with regard to Foremost International Tours' (hereinafter Foremost) allegations that Qantas' activities constitute

violations of sections 402(a), 403(a), and 404(a) of the Federal Aviation Act (hereinafter Act), 49 U.S.C. sections 1372(a), 1373(a), and 1374(a). These allegations put into issue the legality of Qantas' activities as an "in-house" wholesale tour operator. The Bureau of Enforcement stated that the issues raised by these allegations would be more properly resolved by a petition to the Civil Aeronautics Board (hereinafter CAB) for rulemaking. The Bureau of Enforcement did docket a Petition for Enforcement with the CAB, incorporating Foremost's allegations that Qantas' activities constitute violations of sections 403(b), 404(b) and 411 of the Act, 49 U.S.C. sections 1373(b), 1374(b), and 1381.[1] *See generally,* Appendix to petition at 94a-106a.

STATUTES INVOLVED

Sections 408, 409 and 1002(j) of the Act, 49 U.S.C. sections 1378, 1379, and 1482(j) are not relevant to the issues of the present case.

STATEMENT OF THE CASE

With regard to Qantas' Statement of the Case, the following additions and clarifications should be made:

1. Since April 1, 1974, and the termination of its relationship with Qantas, Foremost has operated its

[1] In the Petition for Enforcement, the Bureau of Enforcement noted that the docketing of the Petition does not constitute "Board action." Appendix to petition at 94a.

inclusive tours to the South Pacific with Air New Zealand as the sponsoring and participating airline.

2. The preliminary injunction order which is the basis of this petition was entered on July 26, 1974. Motions to stay or suspend the injunction pending appeal were denied by the Court of Appeals for the Ninth Circuit and this Court. Subsequently, the District Court ordered that the preliminary injunction would be implemented on September 6, 1974.

On September 25 and 26, 1974, the District Court held a hearing to review, consider and determine whether the portion of the Qantas tour price applicable to land costs included the actual costs charged to Qantas and general business costs allocable to an in-house tour operation. At the conclusion of the hearing, the District Court:

> 1. provisionally vacated paragraph 5 of the Order of the Court dated July 26, 1974, so as to allow Qantas to sell the fly/drive tours at issue at the prices presented and approved by the Court at the hearing on September 25 and 26, 1974;
>
> 2. ordered Qantas to present to the Court on June 2, 1975, an accounting reflecting the actual sales experience of Qantas' inclusive tour program and the overhead and general administrative expenses incurred by Qantas for the operation of the land portion of the program during the period April 1, 1974 through March 31, 1975.

The above-mentioned accounting has not yet been presented to the Court.

3. The IATA Resolution to which Qantas refers in the third paragraph on page 5 of the petition is Reso-

lution 810d: Inclusive Tours Initiated by Members. *See* Appendix to this brief at pages i-v. Contrary to Qantas' parenthetical statement that 810d defines the principles under which inclusive tours may be *packaged* by IATA members, the meaning of 810d is far from clear. Additionally, the relevance, if any, to this case of the American Society of Travel Agents' objections to 810d is unclear from a reading of CAB Order E-24886.

4. Qantas states on pages 5-6 of the petition that it filed tariffs with the CAB incorporating the minimum South Pacific inclusive tour selling prices established by the IATA resolutions. The tariff under which Qantas operates its inclusive tours is a joint tariff which Qantas, in conjunction with approximately eighty-six other air carriers and foreign air carriers, files, through an agent, with the CAB. The tariff requirements for Air New Zealand, Foremost's sponsoring carrier, and Qantas Airways Limited, pursuant to the joint tariff, are exactly the same. Included in the tariff are the rules and regulations for the operation of an inclusive tour, including the minimum selling price of the tour per passenger. The tariff specifies the exact air fare to be charged for various tours. The tariff does not specify any charges for the land items which must be included in a tour (sleeping accommodations, sightseeing). There is only the formula for a price below which the tour may not be sold:

> ". . . the applicable group inclusive tour fare plus $130 ($90 for tours to/from Honolulu) for the minimum stay plus $10 for each day of the tour in excess of the minimum stay for which tour features are provided. . ."

5. On page 8 of the petition Qantas has misstated the findings of the District Court. The Court found not only that Qantas was not allocating normal business overhead costs to its inclusive tour prices, but also that Qantas was actually selling its 14-day group inclusive tour to Australia at a loss.

6. Contrary to Qantas' statement on page 9 of the petition, the third-party complaint which Foremost filed with the CAB was not "in every material way identical with the District Court Complaint." In addition to alleging that Qantas was engaging in unfair and deceptive practices and unfair methods of competition in violation of section 411 of the Act, 49 U.S.C. section 1381, Foremost also alleged violations of sections 402, 403(a), (b), 404(a)(2) and (b) of the Act, 49 U.S.C. sections 1372, 1373(a), (b), 1374(a)(2) and (b), and Parts 215.2, 221.3(a), 221.38(a), 221.53, 221.3(b), 223.2 and 223.8 of the CAB's Economic Regulations. *See* Appendix to petition at 74a-93a.

7. As mentioned above at pages 2-3, the CAB declined to institute an enforcement proceeding with regard to Qantas' alleged violations of sections 402 (a), 403(a), and 404(a) of the Act, and the relevant parts of the CAB's Economic Regulations. The CAB did docket a Petition for Enforcement incorporating Foremost's allegations that Qantas is in violation of sections 403(b), 404(b), and 411 of the Act.

ARGUMENT

1. THERE IS NO CONFLICT OF DECISION

The injunctive relief ordered by the District Court in this case was carefully fashioned to avoid a collision between the Court and the CAB. While recognizing that the expertise of the CAB would aid the Court in its adjudication, the Court also recognized that Foremost was threatened with immediate irreparable harm. The threat came from Qantas' practices, among others, of selling certain South Pacific inclusive tours below cost, failing to allocate any of its overhead expenses as costs of the land portion of the tours, and shifting of tours from Foremost to Qantas Holidays.[2]

> "The danger that Foremost will suffer irreparable injury before the CAB has investigated the charges of deceptive practices and unfair methods of competition is very real. Foremost has established that the existence of its business life as a competitor in the freewheeling tour market is threatened." *Foremost, supra,* 379 F.Supp. at 97 (D.Hawaii 1974), Appendix to petition at 47a.

The Court accommodated its equitable power to the initial jurisdiction of the CAB and confined its injunction to monitoring actual and general costs of Qantas on the land arrangements of its inclusive tours and Qantas' proven practice of shifting tours.

---

[2] "Shifting of tours" refers to certain practices of the Qantas reservation staff whereby persons requesting information on Foremost's Royal Road tours were furnished information relating to Qantas Holidays tours. On at least one occasion, a person specifically requesting a Royal Road tour was sold a Qantas Holidays tour. *See* Finding of Fact 21, *Foremost, supra,* 379 F.Supp. at 92, Appendix to petition at 37a.

The District Court molded its relief to preserve the status quo, *i.e.*, the existence of Foremost as a competitor in the South Pacific inclusive tour market. The Court issued this temporary relief because, although it concluded that the CAB had initial jurisdiction of many of the issues in Foremost's complaint, the CAB could *not* act quickly enough to assure Foremost's existence as a competitor. 379 F.Supp. at 96, Appendix to petition at 46a.

This finding of a need for temporary and immediate relief, and the corresponding lack of such a remedy in the CAB, was affirmed by the Court of Appeals for the Ninth Circuit. Appendix at page 28a-29a. Wrote Justice Barnes for the Ninth Circuit:

> "We are forced to conclude that Foremost might lose its entire business while attempting to get a cease and desist order under the mentioned statute [section 411 of the Act, 49 U.S.C. section 1381]." Court of Appeals Opinion, Appendix to petition at 29a, n. 4.

For the reasons discussed below, the injunction issued by the District Court did not interfere with the jurisdiction of the CAB. The decisions of the District Court and the Ninth Circuit in this case are consistent with the doctrine of primary jurisdiction as developed by the decisions of this Court. The petition for a writ of certiorari should be denied.

a. The Opinion of The Ninth Circuit is Consistent With Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963).

Qantas contends:

> "... the costing and marketing of inclusive air tours by airlines are within the pervasive authority of the CAB, and [that] *Pan American* and other decisions of this court bar the injunctive relief granted in this case by the District Court." Petition at 15.

Qantas' conclusion stems from too broad a reading of *Pan American.*

In the first place, neither *Pan American* nor *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363 (1973), upon which Qantas also relies, holds that the Federal Aviation Act completely displaces the antitrust laws. *Pan American, supra,* 371 U.S. at 304-305; *Hughes Tool Co., supra,* 409 U.S. at 387, 389. The exemptions to the antitrust law which the Act bestows are specific and limited.

Secondly, *Pan American* raised issues basic to the regulatory scheme of the Act. The United States filed a civil antitrust action for injunctive relief alleging that Pan American, W. R. Grace and Co., and Panagra had divided routes and territories in South America, that Pan American and Grace had conspired to monopolize air transportation, and that Pan American had prevented Panagra from extending its routes from the Canal Zone to the United States. This Court held that the narrow questions presented by the complaint were entrusted to the CAB.

> ". . . where the problem lies within the purview of the Board, as do questions of division of territories, the allocation of routes, and the affiliation of common carriers with air carriers, Congress must have intended to give it authority that was ample to deal with the evil at hand." 371 U.S. at 312.

The issues raised by the present case are not such "precise ingredients of the Board's authority." In controversy here are the actions of tour wholesalers, persons over which the Board has limited jurisdiction.[3] The heart of the controversy is the land costs for the inclusive tours—costs which are determined independently of air transportation fares which *are* at the heart of the regulatory scheme. The injunction at issue was directed to the land and general overhead costs, not the air fares.

Contrary to Qantas' argument at page 14 of the petition, the Ninth Circuit's holding that the inclusive tour business is not within the pervasive regulatory authority of the CAB did *not* conflict with the CAB's perception of its jurisdiction. The CAB has *not* promulgated regulations governing the activities of tour wholesalers such as are Foremost and Qantas.[4] The CAB regulations which Qantas cites, 14 C.F.R. Part 378 and 378a, do not regulate sellers of inclusive tours pursuant to the IATA Resolutions. They regulate the operation of inclusive tour *charters* by tour operators

[3] *See* Diederich, "Protection of Consumer Interests Under the Federal Aviation Act," 40 J. Air. L. & Comm. 1, 7 (1974).

[4] Qantas is also a foreign air carrier within the meaning of the Act.

who, in effect, are indirect air carriers within the meaning of the Act and, thus, subject to the Act's pervasive regulation.[5] The Ninth Circuit opinion is supported by the Bureau of Enforcement's Letter of Notice of Dismissal, In Part, dated December 15, 1975, at footnote 4:

> "A 'tour operator' can be defined as a business which prepares, operates, and markets on a 'wholesale' basis to travel agents, inclusive (package) tours for air transportation plus ground arrangements. An 'in-house' tour operation can be defined as a tour operator business conducted by a department or office of an air carrier or foreign air carrier, and not through a separate corporate or business structure. (These definitions are not the same as, and should not be confused with, the term 'tour operator' as used in several Parts of the Board's Regulations. Also 'inclusive tours', as used in this letter, should not be confused with 'inclusive tour charters' as used in Part 378 of the Board's Regulations)." Appendix to petition at 99a.

b. The Opinion of The Ninth Circuit is Consistent With Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973).

Qantas argues that the Ninth Circuit decision is in conflict with *Hughes Tool Co.* without making an affirmative showing of wherein lies the conflict. In

[5] The CAB enforcement proceeding in *Trans World Airlines, Inc., Flying Mercury, Inc.*, CAB Docket 24697, Order 73-6-9 (June 4, 1973) does not conflict with the Ninth Circuit decision because in *Flying Mercury* the airline and the tour wholesaler marketed an inclusive tour which failed to contain services actually required by the filed tariff. No such allegation has been made against Qantas in this case.

Hughes Tool Co., this Court held that where the CAB authorizes control of an air carrier by another person, and where the CAB authorizes (for sixteen years) specific transactions in the public interest, the transactions by virtue of section 408 and 414 of the Federal Aviation Act have immunity under the antitrust law. Mr. Justice Douglas, writing for the Court, stressed that every acquisition or lease of aircraft by TWA from Toolco during the years 1944 through 1960 required CAB approval. Everytime the CAB reviewed these transactions between the two companies, the CAB made a finding that such activities were "just and reasonable and in the public interest." 409 U.S. at 379. In addition to approving the actual transactions between the two companies, the CAB dealt with and approved the *way* in which Toolco used its power over TWA. As stated by Justice Douglas:

> "It adds nothing to the analysis to characterize Toolco's exercise of power over TWA as monopolization of the TWA market, for it was precisely such control that the Board opted for in 1944 and in 1950." 409 U.S. at 388.

The facts of the present case contain no such history of scrutiny and approval of Qantas' activities by the CAB. IATA Resolution 810d defines the principles under which inclusive tours may be operated by IATA members. The CAB first approved 810d in 1952. In 1967, by Order E-24886, the CAB denied a petition for CAB review of staff action in approving certain amendments to IATA Resolution 810d. *See* Letter of Notice of Dismissal, In Part, of the Civil Aeronautics Board, dated December 15, 1975, Appendix to petition at 104a. However, there is no indication in the CAB orders that the CAB reviewed or approved the way in which any IATA member, including Qantas, operates its own inclusive tours. In particular, no CAB approval of below cost pricing of land components of a tour has been issued. As the Bureau of Enforcement of the CAB noted in its letter of December 15, 1975:

> "This resolution [810d] was first approved by the Board in 1952, but it does not appear that the advantages and disadvantages of airline 'in-house' tour departments were considered in detail at that time or since." Appendix to petition at 104a.

Antitrust exemptions are narrowly construed. *Maryland and Virginia Milk Producers Assn. v. U.S.*, 362 U.S. 458 (1960). It can hardly be concluded, under the reasoning of *Hughes Tool Co.*, that antitrust immunity pursuant to section 414 of the Act is extended by means of a 1952 and 1967 general order of the CAB to predatory competitive practices such as Qantas exhibited in this case. See Court of Appeals Opinion, Appendix to petition at 25a; *Foremost, supra*, 379 F.Supp. at 94, Appendix to petition at 40a-41a.

c. United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1932), Arrow Transportation Co. v. Southern Ry., 372 U.S. 658 (1963), and Section 1002(j) of the Act are inapposite to the legal and factual issues of this case.

In part 1c of the petition, Qantas argues that because the CAB has the power under section 1002(j)

of the Act, 49 U.S.C. section 1482(j), to suspend the operation of a tariff, the District Court was without the power to grant the injunctive relief which it ordered. In support of this argument Qantas primarily relies on *Arrow Transportation Co. v. Southern Ry., supra,* and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). Qantas has misconstrued the power of the CAB pursuant to section 1002(j) and misread the issues raised in *Arrow* and *SCRAP*.

Qantas argues:

> "... the action of the District Court barred Qantas from selling its tours in accordance with its tariff on file with the CAB, which tariff the CAB could suspend under 1002(j) of the Federal Aviation Act, 49 U.S.C. section 1482(j)." Petition at 20.

This is inaccurate. As discussed above, the tariff under which Qantas sells its inclusive tours is a joint tariff with other domestic and foreign air carriers. The tariff does contain specific fares for air transportation pursuant to an inclusive tour. It does *not* contain specific land fares, but only a formula for the minimum selling price of an inclusive tour per passenger. The injunction issued by the District Court did not bar Qantas from selling pursuant to its tariff (*i.e.,* suspend the tariff). It ordered Qantas to satisfy the Court that the selling price of a Qantas Holidays inclusive tour included actual land costs and an allowance for general business costs. If suspension of the tariff had been ordered by the District Court it would have barred not only Qantas from selling inclusive tours but also Foremost since Air New Zealand, the

Foremost sponsoring carrier, is a party to the same tariff.

Qantas misconstrues the *Arrow* and *SCRAP* cases because these cases concern the issue of reasonableness of a filed tariff. Foremost is not questioning the reasonableness of the Qantas tariff. The issue is a *violation* of a tariff.

The violation arises from Qantas' proven practice of selling its inclusive tours to the South Pacific below cost. The price of an inclusive tour includes a special air fare and certain land arrangements at the destination (*i.e.* hotel, car rental, sightseeing). Foremost submits that Qantas' practice of selling the land components of its tours below cost *cannot* be approved by the CAB. If, as the District Court summarized, Qantas is subsidizing the land arrangements of its tours with profits from the sale of its airplane seats, Qantas is violating its tariff by rebating the air fare. This practice is a violation of Section 403(b) of the Act, 49 U.S.C. section 1373(b). On the other hand, if Qantas' below cost selling is a rebate to the customer on the land arrangements, this is not within the regulatory authority of the CAB. Furthermore, it is below cost selling which, under the circumstances of this case, would be a violation of the antitrust laws. *See, Foremost, supra,* 379 F.Supp. at 97-98, n. 8, Appendix to petition at 49a, n. 8. Either way, the operation and marketing of Qantas' inclusive tours involve illegal conduct. In particular, if Qantas' practices are rebates on the air fare, it is conduct in violation of the Federal Aviation Act—conduct which has not been and cannot be approved by the CAB. Likewise, the

shifting of tours is an anticompetitive practice which can hardly be approved by the CAB.

In other words, Qantas' activities were not of such "debatable legality" that the Court should refrain from imposing injunctive relief in order to avoid a conflict with the CAB. *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213 (1966). In *Carnation,* this Court held that activities which are clearly unlawful under a regulatory scheme are subject to antitrust sanctions so long as the court refrains from action which might interfere with the regulatory agency's exercise of its lawful powers. 383 U.S. at 221. In the case at bar, the District Court's limited injunctive order to protect Foremost precluded any interference with the regulatory authority of the CAB.

The issue in *Arrow* was the lawfulness and reasonableness of railroad rates. Congress had given the Interstate Commerce Commission (ICC) the power, pursuant to 49 U.S.C. section 15(7), to suspend a proposed rate schedule pending the ICC's determination as to whether the rate was lawful. When the ICC failed to make a decision on the reasonableness of the rates for the twelve months following their suspension, the railroads announced they would put the proposed rates into effect. Arrow filed a lawsuit to enjoin the railroads. This Court held that the Interstate Commerce Act rested in the ICC the exclusive power to suspend the railroad rates. Any preexisting powers to grant injunctive relief had been withdrawn from the courts. *Arrow Transportation Co., supra,* 372 U.S. at 667.

Likewise, the *SCRAP* case involved a question of reasonable railroad rates. This Court found that the factual distinctions between *SCRAP* and *Arrow* were inconsequential and, as in *Arrow,* the issuance of an injunction to suspend rates constituted a direct interference with the jurisdiction of the ICC. *SCRAP, supra,* 412 U.S. at 690-699.

Neither of these cases supports Qantas' argument. The power which the CAB holds pursuant to section 1002(j) of the Act is the power to suspend or reject tariffs in international air transportation to and from the United States. Contained in these tariffs are air fares for regularly scheduled flights and formulae for determining the minimum selling price of inclusive tours—neither of which are challenged in the present case. Neither the cost of the land components, nor the market price of the land components, is an element of the tariff. The CAB does not have the power under section 1002(j), or any other section of the Act, to suspend or modify the prices of the land components of the package. As stated by the Ninth Circuit and the District Court, neither the Act nor the CAB regulations authorizes the CAB to grant the preliminary relief necessary to protect Foremost. Court of Appeals Opinion, Appendix to petition at 29a; *Foremost, supra,* 379 F.Supp. at 96, Appendix to petition at 46a. The injunctive relief which the District Court fashioned in this case was not prohibited by previous decisions of this Court or by the Federal Aviation Act.

Qantas also argues that the decision in the present case conflicts with *United States Navigation Co. v.*

Cunard Steamship Co., 284 U.S. 474 (1932). However, *Cunard* involved the reasonableness of contract shipping rates—issues which, like *Pan American,* were basic to the regulatory scheme.

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2. THE DECISIONS BELOW ARE CORRECT

The decisions of the courts below properly applied both the doctrine of primary jurisdiction and the traditional equitable power of a federal court.

The doctrine of primary jurisdiction is not an inflexible doctrine as Qantas' argument suggests. It is a doctrine of accommodation between the court, where jurisdiction of the lawsuit originally lies, and an administrative agency, which has the duty of administering a regulatory scheme. As recognized by the District Court and the Ninth Circuit, resort to the primary jurisdiction of an agency does not preclude a court from issuing equitable relief to preserve the status quo. *Wheelabrator Corporation v. Chafee,* 455 F.2d 1306, 1316-1317 (D.C.C. 1971).

> ". . . the outstanding feature of the doctrine is properly said to be its flexibility permitting the courts to make a workable allocation of business between themselves and the agencies." *Civil Aeronautics Board v. Modern Air Transportation, Inc.,* 179 F.2d 622, 625 (2d Cir. 1950).

In the present case the District Court used this flexibility to preserve Foremost's economic life without material harm to Qantas. Foremost had prayed for an injunction restraining Qantas from acting in any manner whatsoever as a wholesale tour operator.

Complaint, Appendix to petition at 72a. However, the District Court decided that it needed the aid and expertise of the CAB with regard to certain of Qantas' tour operator activities. It limited the injunction to restraining the sale of Qantas' inclusive tours until:

> ". . . [Qantas] has satisfied this court that the portion of the tour price applicable to the land costs includes not only the actual costs charged to Qantas for the land services . . . but also generally including, but not limited to, administration expenses, office expenses, salaries, general in-house expenses and, possibly, advertising and brochure costs, related to Qantas' [sic] Holiday tours." 379 F.Supp. at 98-99, Appendix to petition at 51a.

In September, 1974, Qantas presented revised tour prices to the District Court and the injunction was vacated.

The Ninth Circuit correctly affirmed the narrow injunction which the District Court had fashioned. The Ninth Circuit decision recognizes that the CAB does *not* have pervasive regulatory authority over the wholesale inclusive tour business and that the District Court issued injunctive relief proper under the circumstances of this case. Court of Appeals Opinion, Appendix to petition at 26a-27a.

Qantas argues that the facts of this case preclude the Court from issuing any type of injunctive relief and that the relief granted was "unprecedented." However, the cases which Qantas relies on do not support its argument.

S.S.W., Inc. v. Air Transport Ass'n. of America, 191 F.2d 658 (D.C.C. 1951), *cert. denied,* 343 U.S. 955 (1952), was a case akin to *Pan American,* where the activities complained of were "basic in [the] regulatory scheme" of the Federal Aviation Act. *Pan American, supra,* 371 U.S. at 305. Such are not the facts of the present case.

Laveson v. Trans World Airlines, Inc., 471 F.2d 76 (3d Cir. 1972) involved the reasonableness of charges for inflight movie entertainment. The CAB had been considering the question for five years before the lawsuit. The "headset controversy," as the court termed it, was basic to the regulatory scheme because of its direct impact on air fares. *Id.* at 80. In the present case the injunction did not affect the inclusive tour air fares or any other element of the CAB's regulatory authority.

The injunction in *Delaware River Port Authority v. Transamerican Trail. Tr., Inc.,* 501 F.2d 917 (3d Cir. 1974) was reversed because the plaintiffs failed to show a probability of success on the merits of the litigation. *Id.* at 923-24. In the present case, both the District Court and the Ninth Circuit found Foremost demonstrated a probability of success on the merits. Court of Appeals Opinion, Appendix to petition at 29a; *Foremost, supra,* 379 F.Supp. at 97-98, n. 8, Appendix to petition at 49a, n. 8.

MCI Communications Corp. v. American Tel. & Tel. Co., 496 F.2d 214 (3d Cir. 1974), involved a question of clarification of the meaning of recent orders of the FCC. The case suggests that there are situations

when an injunction may issue despite the primary jurisdiction of an administrative agency. *Cf., MCI Communications Corp., supra,* 496 F.2d at 220.

Carter v. Am. Tel. and Telegraph Co., 365 F.2d 486 (5th Cir. 1966), like *Arrow* and *SCRAP, supra,* involved issues of the reasonableness and applicability of a filed tariff—questions peculiarly within the jurisdiction of an administrative agency.

Qantas makes much of the fact that in *Wheelabrator Corporation v. Chafee, supra,* the General Accounting Office's decision did not operate as a legal determination of the rights of the parties. However, the District of Columbia Circuit reasoned that this did not preclude injunctive relief by a district court since the expertise of the agency was the "life and reason of the primary jurisdiction rule." 455 F.2d at 1316.

> "The preliminary injunction may be used to preserve the status quo and while securing for the court the benefit of the GAO's expertise. Where a court has warrant for issuing an injunction pending GAO determination it may be able to obviate the objection sometimes leveled at GAO's procedure, that the time required sometimes renders the matter moot prior to GAO's determination." *Id.* at 1316.

This decision, relied on by the Ninth Circuit, directly supports the injunctive relief which the District Court ordered against Qantas. The District Court felt that the expertise of the CAB could aid it in deciding Foremost's antitrust suit. However, to enable Foremost to weather the conduct complained of,

a preliminary injunction was necessary pending the referral to the CAB.

That the decision of the District Court may be unprecedented is not a reason for this Court to grant certiorari if authority for the decision can be found in prior decisions of this Court and the federal appellate courts. *Cf.*, Supreme Court Rule 19; *Arrow Transportation Co., supra,* 372 U.S. at 671, n. 22.

The injunctive relief granted in this case was entirely proper and did not intrude upon the regulatory authority of the CAB. Rather, it was an orderly coordination of the traditional equity power of the federal courts and the authority of the CAB to render any expertise it may have regarding the wholesale inclusive tour business.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case be denied.

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Of Counsel.

Dated, April 12, 1976

(Appendix Follows)

APPENDIX

Appendix

IATA RESOLUTION 810d

Inclusive Tours Initiated by Members

180/810d (amended) Expiry: Indefinite
314/810d (amended) Type: B

RESOLVED that, the term 'inclusive tours' as used in Resolution 810a to determine the eligibility of an IATA Sales Agency for additional commission, when initiated by one or more IATA Members, shall be defined in accordance with the following principles:

(a) TC1 ONLY tours shall provide for round trip and circle [t]rip transportation, wholly or partially over the lines of one or more Members, and shall include in their published price features such as hotel accommodations and other facilities and attractions. The tour features, in addition to the air transportation included in the total price, must not amount to less than 20% of the air fare or US$15, whichever is greater;

(a) TC3 ONLY tours shall provide for round trip and circle trip transportation, wholly or partially over the lines of one or more Members, and shall include in their published price features such as hotel accommodations and other facilities and attractions. The tour features, in addition to the air transportation included in the total price, must not amount to less than 20% of the air fare or UK£5.85, whichever is greater;

(b) tours must be advertised under the names of the initiating Member(s);

(c) the initiating Member(s) shall obtain approval of all participating Members before authorizing the tour;

(d) trade titles or reference numbers (tour codes pursuant to Resolution 275e) of the approved tours must be quoted on air tickets or exchange orders and at least once in a prominent position on other travel documents including the tour folder as [sic] booklets;

(e) the travel documents must be shown upon any Member's request at the time of travel;

(f) reasonable modification of a tour may be permitted to meet passenger's convenience or abnormal circumstances;

(g) the initiating Member(s) must advertise the tour by means of folders or booklets;

(h) it must be evident that the folder or booklet is an official piece of literature of the Member(s). The front cover shall show only the name of the Member(s) and provide space for the name of an agent only in the customary box on the back cover. The name of the tour operator shall appear only in the 'conditions' of the folder;

(i) the folder or booklet must include at least one representative illustration or map;

(j) the folder or booklet shall name all Members participating in the inclusive tour;

(k) the initiating Member must print and distribute sufficient copies of any approved tour folder or booklet and must reissue such additional quantities of tour folders or booklets as may from time to time be necessary to continue the promotion and sale of the tour. Any folder or booklets promoting tours on a year round basis must be issued annually in quantities of at least 3,000 and such annual reissue must be approved, as provided in Subparagraph (c). All tour folders must show either an effective date of departure of [sic] the date of printing;

(l) any Member may request the appropriate Agency Administration Board to review the tour folders, booklets or alternative advertising referred to in Subparagraph (g) and to determine whether they satisfy the requirements set forth herein. Upon disapproval of any tour folder, booklet or alternative advertising by the Agency Administration Board, the participating Members shall immediately discontinue payment of the additional commission provided for in this Resolution on the tour contained in the tour folder, booklet, or alternative advertising, thus disapproved;

(m) TC1 ONLY except as provided in Resolutions JT12(36)810d and JT123(30)810d, the provisions of this resolution shall apply only to tours sold within the area of TC1 for

transportation wholly within that area and for transportation from TC1 to TC2 and/or TC3 and return;

(m) TC3 ONLY the provisions of this Resolution shall apply only to tours sold within the area of TC3 for transportation wholly within that area, for transportation from Japan, Australasia [sic] or Okinawa to points in TC2 and/or TC1 and return, and for transportation originating in TC3 to points in TC1 via the Pacific and return;

(n) nothing herein shall be deemed to preclude application of the provisions hereof to inclusive tours which are performed partly by surface transportation and partly by air transportation;

(o) notwithstanding anything in the preamble hereof, a Member may pay to its General Passenger Sales Agent(s) or to an air or surface carrier with which it has an interline traffic agreement or other form of agreement authorizing the sale of international air transportation, an additional commission as authorized to Passenger Sales Agents in Resolution 810a; provided that the provisions of Subparagraphs (a) to (n) above are complied with.

GOVERNMENT RESERVATIONS

Consult Government Reservations Section

GOVERNMENT RESERVATIONS:

810d

UNITED STATES

Order E-12305 dated 31 March 1958:

The provisions of Resolution 810d authorizing reasonable modification of a tour are limited to minor adjustments, involve no extra expenses to the carrier, and are applied alike to all passengers, and the Resolution will be subject to further review if evidence appears of inequitable application of such provision.